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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 379.

COLORADO INTERSTATE GAS COMPANY, a Corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

REPLY BRIEF OF PETITIONER.

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The Commission, commencing on Page 54 of its Brief, assumes without argument or proof that it is vested with administrative discretion in the matter of allocation. As to sales within its jurisdiction, Petitioner does not dispute that proposition. Here, however, the question relates to the Commission's power over business not subject to its jurisdiction. In that respect the statutory limitations must be given effect. This Court held in the case of *Siler v. L. & N. Railway Company*, 213 U. S. 175, as follows:

"The Commission as an extraordinary tribunal of the State must have the power herein exercised conferred by a statute in language free from doubt. The

power is not to be taken by implication; it must be given by language which admits of no other reasonable construction."

Additional authorities supporting this proposition are cited on page 34 of the Brief of Canadian River Gas Company, Petitioner in No. 380.

Whatever the Commission's administrative discretion in the adoption of a method of allocation relating to sales under its jurisdiction, it is not true that Congress has left to the expert judgment of the Commission any discretion with respect to sales of gas for consumption. The decisions of this Court in the *Minnesota Rate Cases*, 230 U. S. 352 and in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133, clearly distinguish between the power of a regulatory authority over business subject to its jurisdiction and that business not so subject.

Commission Counsel attempts to distinguish these cases by characterizing them as decisions concerning the power of State agencies over interstate operations, which are constitutionally immune from State regulation. Whatever the power of Congress may be over sales to consumers by a natural gas company, it is certain that as yet such sales are constitutionally immune from Federal Power Commission regulation. The seizure and exercise of authority by the Commission over business not committed by Congress to its jurisdiction is in violation of the 5th Amendment to the Federal Constitution. The duty of the Commission here was first to determine the property used and useful in serving the regulated business and to charge that business with the full costs of the construction and operation of that property.

THE COMMISSION'S ALLOCATION.

Respondent seeks to bring this proceeding within the administrative discretion which it is authorized to exercise in order that Petitioner may be denied its claim of constitutional violation. The reasonableness of the allocation used

by the Commission is not the issue here. Rather, we must determine if the allocation used resulted in a violation of the jurisdictional prohibitions of the Act.

We do not contend that the treatment by the Commission of a transmission line as a unit is beyond its jurisdiction when related solely to the sales over which it has jurisdiction. Such jurisdictional sales were involved in the cases cited by Respondent on Pages 69, 71 and 73 of its Brief. However, when the Commission seeks to charge the unregulable business with costs of construction and operation of property not used and useful in serving that business, it is exceeding its jurisdiction and taking from this Petitioner earnings from that business which Congress has said it may keep. The fact that uniform rates have been established by Petitioner for gas sold at wholesale for distribution in Pueblo, Colorado Springs and Denver, recognizes the treatment of the transmission line as a unit where the sales are subject to jurisdiction. However, the prices charged industrial customers by Petitioner are not uniform, they are not in relation to the quantity of property used but are based on the competitive value of natural gas. These contracts are found in the record Vol. 1, Pages 936 to 956.

THE LACK OF FINDINGS.

Apparently Respondent recognizes the inadequacy of the findings made in respect of the costs assigned to this Petitioner in its opinion. The testimony on allocation of the Commission witness is found in Vols. 4 and 5 of the record, Pages 2316 to 2450. This testimony and the exhibit of the witness treat the operations of Canadian River Gas Company and Petitioner as a unit. Counsel for the Commission now attaches to their Brief as an Appendix certain schedules for the purpose of supplying the information which should have been included in its findings. These are not a part of the record, and when Petitioner requested the Commission to furnish it with such data at the time the order was entered the request was preemptorily refused.

We submit that the Commission cannot now cure that error in its order by such means.

CONCLUSION.

The Commission clearly has no jurisdiction over the business carried on by this Petitioner in the sale of gas for consumption by its customers. The Brief of Respondent, Pages 20 and 21, quotes from the report of the House Committee that portion stating that the exceptions contained in Section 1(b) were not necessary stating that "since no jurisdiction is given to the Commission to regulate sales to consumers, the Commission would have no authority over distribution, whether or not local in character." In the Annual Report of the Commission for the year 1940 the lack of jurisdiction over such sales is stated and discussed. This being so, the Commission does not have the discretion which is accorded it when acting within the ambit of its statutory authority.

The use of an allocation method which fails to segregate property on the basis of use and places costs on the non-jurisdictional business, is wholly beyond the Commission's authority. The dollar result is not the only important consideration since it is a matter of principle we are discussing. Whatever may be the dollar result in this particular case, there should now be established the correct principles to govern future Commission action. Large quantities of gas may be sold for consumption by this company and other Companies in the future and a wrong interpretation of the Commission's authority in this case might have serious financial repercussions in future years.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and the case should be remanded to the Commission with instructions to determine the property used and useful in the service under its

jurisdiction under the principles contended for by this Petitioner and heretofore announced by this Court.

Respectfully submitted,

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